BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	MB Docket No. 07-42
Leased Commercial Access	)	

JOINT OPPOSITION TO REQUEST OF NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION FOR A STAY

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SUMMARY

The Community Broadcasters Association ("CBA") and CaribeVisión TV Network, LLC ("CaribeVisión") oppose the request for stay (the "Request") of the Commission's Report and Order In the Matter of Leased Commercial Access, FCC 07-208 (rel. February 1, 2008) ("Order") filed on March 28, 2008, by the National Cable & Telecommunications Association ("NCTA").

The Request fails to meet the standards for a stay. There is no likelihood of success on the merits. NCTA has failed to demonstrate that the fee formula adopted by the Commission is unreasonable or confiscatory and the under-utilization of cable channels by leased access that animated the Order warrants significant reduction in such rates. The Commission gave adequate notice of the Order's outcome in its Notice of Proposed Rulemaking. Nor is there any rational basis for gutting leased access by retreating from the requirement that cable operators provide certain business information in order to enable leased access programmers to make their channel requests.

NCTA has also failed to proffer hard evidence of irreparable harm from the Order's effectuation. NCTA's speculation that a "flood" of leased access programmers will descend on cable systems if the Order goes into effect is again speculative and self-serving in light of the very few programmers now on cable and the expansion of cable channel capacity in recent years.

Grant of the stay would irreparably harm leased access programmers and cable audiences. CBA's members and CaribeVisión would suffer irreversible damage from continued excessive fees and cable operators' foot-dragging and obstructive behavior designed to thwart their rights under Section 612 of the Communications Act. Cable viewers would be deprived of

their First Amendment right to view the locally-oriented, diverse programming from local access programmers Section 612 sought to foster.

Finally, the public interest is served here by denial of the requested stay. Section 612 and controlling Constitutional principles define the public interest in the instant context as the promotion of "competition in the delivery of diverse sources of video programming" and the "widest possible diversity of information sources" for cable subscribers. The stay would undermine these goals by perpetuating the status quo, wherein only 0.7 percent of cable channels are devoted to leased access programming in contrast to a 15% cap on mandated access. This situation is intolerable, and the public interest would be disserved by any delay in addressing it.

The Request must therefore be denied.

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The Community Broadcasters Association ("CBA") and CaribeVisión TV Network, LLC ("CVTV"), pursuant to Section 1.43 of the Commission's rules, Section 47 CFR §1.43, and by their attorneys, hereby jointly oppose the Request for a Stay ("Request") of the Commission's Report and Order, In the Matter of Leased Commercial Access, MB Docket No. 07-42, FCC 07-208 (rel. February 1, 2008) ("Order"), filed by the National Cable & Telecommunications Association ("NCTA") on March 28, 2008.[1]

I. Introduction

CBA is the non-profit trade association of Class A television stations and low power television stations located throughout the United States. Class A stations are the only stations that are by law required to broadcast locally originated programming -- three hours a week.[2] Most of the Class A and low power television stations owned by CBA members do not enjoy mandatory cable carriage rights under the FCC's rules. Accordingly, as CBA represented in the FCC's proceedings leading to the Order, such Class A and low power television stations are

[1] This Opposition is timely filed, pursuant to the revised filing deadline established by the Commission in *Public Notice*, DA 08-823 (released April 4, 2008).
[2] *See* the *Community Broadcasters Protection Act of 1999*, codified in Sec. 336(f)(2)(A)(II) of the Communications Act, 47 USC Sec. 336(f)(2)(A)(II).

primary candidates for leasing cable channels pursuant to the commercial leased access rules, because they broadcast locally produced, community-oriented programming and because they usually cannot get on cable TV systems any other way. CBA's members provide programming to cable television subscribers pursuant to the FCC's commercial leased access rules. Therefore, any decision by the Commission staying the rules enacted in the Order would adversely affect CBA members' access to cable television subscribers and thus adversely affect the businesses of such CBA members. CBA participated in the relevant FCC proceedings leading to the Order.

CVTV is an independent video programmer, unaffiliated with any cable operator, which provides Spanish-language programming to broadcast station affiliates and cable television systems. In addition, subsidiaries of CaribeVisión Holdings, Inc. ("CVH" and, together with CVTV, "CaribeVisión") own and operate full power and low power television broadcast stations. CaribeVisión also currently provides programming to cable television subscribers under the FCC's commercial leased access rules and therefore is directly affected by any changes to the rules governing commercial leased access. A stay of the Order would adversely affect the rates, terms and conditions of CaribeVisión's access to cable television subscribers under the commercial leased access rules and its business therefore would be adversely affected by a grant of the stay. CaribeVisión participated in the relevant FCC proceedings leading to the Order, and it has filed a Notice of Intention and Motion to Intervene in the appeal of the Order currently docketed in the U.S. Court of Appeals for the Sixth Circuit.[3]

NCTA seeks a stay of the Order on the grounds that it allegedly "dramatically alters the rules governing commercial leased access." Request at 1. NCTA claims that the Order adopts a new formula for the permissible fees to be charged to leased access users which will "encourage a flood of new commercial leased access users." Request at 2. This "flood" of new users,

[3] *See, NCTA et. al. v. FCC*, No. 08-3245, filed April 3, 2008.

according to NCTA, will disrupt cable programming lineups, adversely affect cable operators' finances and competitive position, harm consumers, and deprive cable networks of channels or force them to less desirable channels. NCTA maintains that it will "rob" operators of channels they could use for provision of Internet access and voice services. And, in NCTA's view, it will force cable operators to disclose confidential business data to potential access users. NCTA argues that the Order will therefore cause its members irreparable harm such that a stay is justified.

NCTA's hand-wringing notwithstanding, its arguments boil down to three elements: (a) the Commission has not properly protected the operation, financial condition or market development of cable systems as required by the 1984 and 1992 Acts; (b) the Commission did not give adequate notice of or justify the ten-cent cap on fees per subscriber per month; and (c) the new rules yield a near zero fee for some cable operations that is confiscatory. None of these arguments satisfies the heavy burden that the Commission's decisions impose on a stay movant. It must therefore be denied.

II. <u>Argument</u>

A. NCTA Has Not Established A Likelihood of Success on the Merits.

To prevail on a request for a stay, NCTA must show that it is likely to win on the merits, that the harm to its members will be greater than the harm that a stay would cause to not only leased access providers, but to the public that wishes to view their programs, and that the public interest would be served by postponing the effective date of the rules.

On the merits, NCTA's emphasis is on what it claims are unfairly low rates set by the Commission in the Order. But, as NCTA itself notes, the D.C. Circuit upheld an earlier Commission finding that "set rates that balance the needs of leased access programmers and cable operators ...."[4] The issue, thus, is balance, not solely protecting the cash receipts of cable operators.[5] Moreover, the *Valuevision* Court did not say that the balance that the Commission reached over a decade ago is the only lawful balance or that the Commission cannot change the balance in light of failed experience under the prior rules. The Commission has reset the balance and articulated its rationale for doing so.[6] In light of the abject failure of the current regulatory regime, largely as a result of the Commission's current rules on pricing of leased access channels, it is likely that the Court of Appeals will find the revised balance struck by the Commission to be prudent, and certainly not arbitrary and capricious.

As to the possibility that some cable operators will have to make leased channels available at no cost, the Request does not in any way adequately document specific calculations that demonstrate free access will be mandated in any meaningful number of cases. Further, even if such cases existed, the Request provides no evidence that this would occur in any situation other than those where cable channels had minimal allocable value to the cable system. Finally, if the Commission's formula required channels with real value to be given away, resort by a cable operator to a waiver request for the affected individual system would be appropriate and available.

NCTA also asserts that the Commission gave inadequate notice of the rate formula it adopted in the Order. The crux of this argument is that notice that a specific cap might be adopted was required in order to meet the agency's burden under the Administrative Procedure

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4 Request at 6. *See, Valuevision International v. FCC,* 149 F.3d 1204 (D.C. Cir. 1998).

5 In evaluating the proper balance for calculating leased access rates, it should be noted that any standard rate can be significantly more burdensome on programmers targeting minority audiences than on other programmers. This is because in most cases, minority programmers must purchase leased access on headends or cable systems where their target audience is a small minority of the subscribers, and thus in effect, the minority programmer pays much more per subscriber to reach its target subscribers than a general programmer pays per subscriber to reach all of the subscribers to that headend or system.

6 *See, e.g.,* Order at paras. 41-45, explaining the basis for shifting from use of an average implicit fee to use of a marginal implicit fee.

Act. But even a cursory review of the Notice of Proposed Rulemaking here demonstrates that the Commission gave adequate notice that it was focused on the under-utilization of cable channels by leased access operators due to the size of the fees cable operators are charging for such channels. The Commission was clearly focused on the possibility of bringing down the cost of leased access in order to increase usage by potential leased access programmers. Thus, contrary to NCTA's argument, the fee cap was a "logical outgrowth" of the agency's notice. Cable operators should have anticipated that a cap might be imposed if the record demonstrated, as the Commission stated that it might, that high rates were blocking access. They also might have intuited it from the Commission's desire to settle on an approach relying on a fixed cap that all affected parties could easily apply. Nothing more was required to put NCTA's members on notice.

NCTA also alleges that the "requirement that able operators release to the public the number of subscribers subscribing to each tier containing leased channels would irreparably harm NCTA's members." Request at 25. Similarly, the requirement to provide leased access rates, the calculations to determine them and monthly per subscriber affiliation fees would, according to NCTA, cause its members harm for which they could not be compensated Here again, NCTA's whining and hard-wringing is without rational basis. The Commission has not required "disclosure of a breakdown of individual programming costs to comply with this requirement." Request at 26. Even should it do so, it would be acting consistently with Section 612's mandate. The statute says nothing about confidentiality issues and inevitably contemplates that cable operators should disclose whatever information is necessary to determine whether they are acting in good faith compliance with the statute. Further, if NCTA's concerns are real, mechanisms could be put into place, like the ones mandated by the Commission for the discovery process following a leased access operator's complaint, to protect proprietary information by prohibiting its disclosure to anyone other then the leased access programmer and its staff and professional advisers. *See* Order at para. 62.

B. Cable Operators and Networks Will Not Suffer Irreparable Injury If a Stay Is Denied.

1. NCTA Has Not Adequately Demonstrated That Any of its Predicted Adverse Effects Will Occur.

The entire premise of NCTA's argument is that the Order will mandate free pricing of channels for leased access use, resulting in a "flood" of leased access users who will descend on cable operators and massively disrupt the operation of cable systems.. NCTA has failed to demonstrate that the new pricing rules in the Order will compel such a give-away of the channels. But even if this premise were true, it would still not establish empirically that leased access users will descend on cable operators in droves. That conclusion in the Request is based completely on the self-serving and conclusory declarations of its members. In essence, NCTA is relying on pure speculation, untested by any experiential or empirical evidence.

Likewise, the Request provides no solid evidence -- just the self-serving declarations of cable principals -- that the "flood" of new leased access providers will require radical restructuring of cable service offerings, disrupt the cable business, alienate customers, and drive them to cable's competitors. There is no explanation provided for NCTA's claim that the new rules will force operators to remove program channels from certain tiers and replace them with leased access channels: there is no apparent reason why the expanded basic tiers of these systems could not merely be further expanded to include leased access programming, without deleting existing channels.[7]

[7] While the Request makes it clear that cable operators are trying to "clear" analog channels from their systems and move more programming to digital tiers, once such digital tiers meet the 50% subscriber penetration rate, the

It must be noted that the same arguments regarding lack of adequate channel capacity were made by the cable operators and networks, but rejected eleven years ago during the litigation over must-carry rules. In upholding the Commission's must carry rules against claims that operators did not have the channel capacity to comply, the Supreme Court stated that "[a]ppellants say the burden of must-carry is great, but the evidence adduced on remand indicates the actual effects are modest. Significant evidence indicates the vast majority of cable operators have not been affected in a significant manner by must-carry." *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 124 (1997) ("*Turner II*"). Cable systems then typically had 36 to 50 channels, and must-carry required allocation of up to one-third of those channels, yet their capacity arguments were rejected. Now, cable systems typically have 100 to 200 channels or more, and there is a cap on the leased access obligation of 15 percent of channel capacity, and accordingly, the channel capacity arguments are even less persuasive. Moreover, with the increasing digitalization of cable systems, each channel takes up significantly less capacity than the analog channels that constituted all that cable operators had in the 1990's, and channel capacity will likely continue to grow.[8]

NCTA also raises the stale contentions that re-positioning of cable networks will damage the reputation of those networks with their subscribers, who will ascribe the changes associated with expanded leased access to negative evaluations of the networks. Again, there is no actual evidence for this provided in the Request, and it echoes failed arguments made in the must-carry

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leased access channels can be placed on such digital tiers. *See,* In the Matter of Real Estate T.V., LLC v. Cox Media New Orleans and Cox Communications Louisiana, LLC d/b/a Cox Media, DA 08-369 (released February 14, 2008), at para. 9.

[8] *Cf. Turner II, 520 U.S. at 228,* Concurring Opinion of J. Breyer: "I agree further that the burden [that Sections 614 and 615 of] the statute imposes upon the cable system, potential cable programmers, and cable viewers, is limited and will diminish as typical cable system capacity grows over time."

battles of the 1990's. Indeed, it ignores the reality that those same cable networks who raised arguments like this (such as Discovery and C-SPAN) have subsequently grown and are flourishing.

Lastly, NCTA asserts that because leased access programming is allegedly amateurish, badly-produced, repetitive, and non-competitive with network programming, provision of channel space to such programming will drive cable's subscribers to their competitors. It is difficult to understand how the validity of these scurrilous assertions can be evaluated, given how little leased access programming is currently carried on cable systems. It is just as likely that more locally-oriented and diverse programming furnished by leased access programmers will assist cable's competitive position by distinguishing its programming from otherwise largely identical DBS fare, and therefore attract new customers to cable operators.[9] NCTA's assertions to the contrary are again conclusory and self-serving.

Moreover, NCTA's assumption that if leased access increases, desirable programming will have to be removed to make way for undesirable programming, invites the Commission to make judgments about program content, which judgments are Constitutionally prohibited. That is one reason why Section 612 of the Communications Act is directed toward the identity of voices, not the content of what those voices say. NCTA is trying to limit the number of voices by stifling access by sources other than those chosen by cable operators -- exactly the situation that Congress did not want and that the new rules are designed to ameliorate.

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[9] Any argument that inclusion of leased access programming will reduce the quality of cable services should be rejected out of hand. It is not logical or reasonable to assume that independent program sources will lease channels for their worst programming. Rather, they will lease channels for their best programming. Certainly CaribeVision and Class A/Low Power TV stations will put their best foot forward, and it is the experience of CaribeVisión and CBA members that the programming they present is valued by a substantial audience, which they already must compete for over-the-air. They believe that lower leased access fees will allow them to devote the saved expenses to even greater production quality.

2. *Any Disruption to or Operational Problems of Cable Systems Would Ultimately be Caused By Section 612's Mandate To Increase Diversity and Competition, Not by the Commission's Order.*

As NCTA concedes, Congress created the commercial leased access requirement to promote "competition in the delivery of diverse sources of video programming" and the availability of the "widest possible diversity of information sources." 47 U.S.C. §532(a). Unfortunately, sixteen years after Congress established these goals, the right to leased access is grossly underutilized. According to the Commission, the average number of cable channels devoted to leased access is 0.7, a pathetically low figure. See *Report on Cable Industry Prices*, 21 FCC Rcd 15087 (2006) at Attachment 9. The Order is designed to remedy this situation, consistent with Congressional intent.[10]

Many of NCTA's arguments about the harm that the new access rules will cause ignore the Congressional mandate to make leased access effective. The requirements for a stay are stringent, particularly where the Commission has made a finding that the current leased access regulatory regime has been highly ineffective, and requires radical reform. NCTA's arguments in support of its claims of irreparable harm from the Order are in large part trumped by the Congressional intent as evinced in Section 612.

The requirement of Section 612 of the Communications Act for cable operators to make up to 15 percent of their channels available for leased access makes no exceptions for disruption to channel lineups, resulting dissatisfaction of subscribers, the need to revise marketing materials and channel lineups, the quality of leased access programming or the need to disclose sensitive business information. In enacting Section 612, Congress either understood that some disruption

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[10] NCTA's suggestion (Request at n.19.) that the growth of unaffiliated networks and the Internet will suffice to serve the Congressional purpose is not supported by any statutory authority or legislative history. It is also irrelevant: regardless of these alternative media sources, the mandate for cable TV commercial leased access remains apparent and statutorily required.

would be a possible consequence of accommodating leased access programming on complex cable systems, or Congress may well have realized that the parade of horrors asserted in the Request need not occur in a well run cable system. In either case, Congress required cable operators to set aside 15 percent of their channels, and it is that set-aside, not the Commission's Order, which would be the ultimate cause of the disruption that NCTA fears. If it is concerned about disruption from use of leased access, NCTA needs to attack Section 612, not the Commission's Order thereunder.

C. Local Access Programmers and Cable Subscribers Will Suffer Irreparable Harm From A Stay.

Unable to secure channel access on cable systems in all but exceptional cases, local access programmers have been frozen out of their Congressionally-mandated status by cable operators' game playing, delaying tactics, excessive rates, and general unwillingness to abide by the Commission's leased access rules. Now the Commission has offered leased access programmers a life jacket -- new rules that are balanced, aggressive and designed to work in the real world. If NCTA's proposed stay is granted, CBA's members and CaribeVisión will be deprived of that life jacket during the pendency of the litigation. Since many of CBA's members are small, local, standalone operators who operate on the edge of financial solvency, this delay could be catastrophic.[11] It would also allow cable systems to continue their exclusionary practices and to further alter their carriage capacity to undermine access to the appropriate tiers on the systems suitable for access programmers. After twenty four years of being denied their rights, programmers cannot agree that further delay will have no impact on them,

Similarly, cable viewers will suffer irreparable harm from a stay. Their constitutional rights to "the widest possible dissemination of information from diverse and antagonistic

[11] The heavy financial burden of the current high leased access rates has forced CaribeVisión to recently request reduction in geographic coverage in certain cable systems, in order to reduce expenses.

sources," <u>Associated Press v. United States</u>, 326 U.S. 1, 20 (1945), would be undermined. Again, the one of the core purposes of Title VI of the Communications Act is the "promot[ion] of diverse views provided through multiple technology media." *See,* Section 2(a)(6) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.[12] If the stay were granted, this would seriously infringe for an indeterminate amount of time the First Amendment and statutory right of cable viewers to view leased access programming, designed to provide diverse, locally-oriented content not otherwise generally available to the public. Yet, as even the Request recognizes, "[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976).

D. Grant of a Stay Would Not Serve the Public Interest.

At bottom, whatever the individual equities here, it is the public interest that must be served. The Communications Act requires this allocation of priorities and the standards for a stay include examination of where the public interest lies. The record below demonstrates a remarkable lack of compliance with Section 612 by cable operators and a consequent gross under-utilization of cable channels by leased access programmers. This reality contravenes Section 612 and the vital public interest considerations that underlie it. Moreover, it undermines the First Amendment rights of programmers to access and viewers to diversity. Therefore, the Commission's attempt to strengthen enforcement of Section 612 is at its core motivated by and in harmony with the public interest.

This does not mean that the details of the Commission's approach and the specific actions it contemplates are beyond review. But it does mean that NCTA's arguments can be addressed on appeal after the new rules go into affect and after a full appellate process. No stay to roll back

[12] *See also, Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 663 (1994).

the Commission's carefully-tailored rules before they have an opportunity to go into effect is justified.

III. Conclusion

The Commission should deny the relief NCTA seeks. It has failed to demonstrate irreparable harm to its members from the Commission's rules. It has likewise failed to show that CBA's members and CaribeVisión would not suffer irreparable harm from a stay. NCTA has not established a likelihood of success on the merits. The public interest lies in enforcement of the Commission's new cable access rules.

Respectfully submitted,

COMMUNITY BROADCASTERS
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April 11, 2008

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CERTIFICATE OF SERVICE

I, Evelyn Thompson, a secretary at Fletcher, Heald & Hildreth PLC, hereby certify that a true and correct copy of the foregoing "Joint Opposition to Request of National Cable & Telecommunications Association for a Stay" was sent on this 11th day of April, 2008, via First-Class United States mail, postage pre-paid, or as otherwise specified to the following:

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